

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

HONEYVILLE GRAIN, INC.

Employer

and

Case No. 31-RC-8075

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
INDUSTRIAL & ALLIED WORKERS OF AMERICA
LOCAL 166, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.^{1/}
3. The Labor Organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:^{2/}

INCLUDED: Full-time and regular part-time drivers employed by Honeyville Grain Inc. at or out of 11600 Dayton Drive, Rancho Cucamonga, California.

EXCLUDED: Quality assurance employees, warehouse employees, production employees, maintenance employees, mix room employees, office clerical employees, professional employees, all other employees, guards, and supervisors as defined in the Act.^{3/}

DIRECTION OF ELECTION^{4/}

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have

not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by **TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, INDUSTRIAL & ALLIED WORKERS OF AMERICA, LOCAL 166, INTERNATIONAL BROTHERHOOD OF TEAMSTERS.**

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that an election eligibility list, containing the **FULL** names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 31 within 7 days of the date of the Decision and Direction of Election. The list must be of sufficiently large type to be clearly legible. This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

In order to be timely filed, such list must be received in the Regional Office, 11150 West Olympic Blvd., Suite 700, Los Angeles, California 90064-1824, on or before **March 20, 2002**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please

furnish a total of 2 copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed the preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.).

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by **March 27, 2002**.

DATED at Los Angeles, California this 13th day of March 2002.

/s/ Byron B. Kohn
Byron B. Kohn, Acting Regional Director
National Labor Relations Board
Region 31

FOOTNOTES

- 1/ The Employer, Honeyville Grain, Inc., a Utah corporation, is engaged in the business of manufacturing, distributing, and warehousing food grade products at its facility in Rancho Cucamonga, California (the "facility"). During the past 12 months, a representative period, the Employer, at the facility, purchased materials valued in excess of \$50,000.00 directly from entities located directly outside the State of California. The Employer thus satisfies the statutory jurisdictional requirement as well as the Board's discretionary standard for asserting jurisdiction herein. *Siemons Mailing Service*, 122 NLRB 81 (1959).
- 2/ The Employer receives, processes, warehouses, packages, and distributes food products—including grain mixes, corn products, flour mixes, bakery mixes, beverage and dessert blends, soy products, sweeteners and sugars, shortenings and oils, bakery ingredients, and bean and rice products. The primary customers supplied by the Employer are restaurants and other food vendors. The facility involved in this proceeding is located at 11600 Dayton Drive in Rancho Cucamonga, California, 91730. The Employer also operates two other facilities located in Utah which are not involved in this proceeding.

STATEMENT OF THE ISSUE

The only issue involved in this matter is the composition of the unit. The Petitioner seeks to represent a unit of all full-time and regular part-time drivers employed by the Employer at the facility. The Employer asserts that the unit must also include employees in the warehouse, production, mix room, quality assurance, and maintenance departments. There is no history of collective bargaining history involving the employees in the unit sought by the Petitioner. No other labor organization seeks to represent the drivers in a broader unit.

FACTUAL BACKGROUND

The vice president of operations/division manager oversees the entire facility. The departments within the facility are transportation, office, warehouse, production, mix, maintenance, and quality assurance. (Neither party seeks the inclusion of office employees in the unit.) Each department is supervised by a departmental manager, whom the parties agree is a statutory supervisor. The unit which the Employer seeks includes a total of 111 employees employed at the facility. The transportation department has a total of 33 drivers, production has 15 employees, warehouse has 25 employees, mix has 28 employees, quality assurance has 5 employees, and maintenance has 5 employees.

The facility is housed in one 210,000 square foot building surrounded by outside operations. To the rear or northern side of the facility are two railroad tracks where raw materials are unloaded. Directly outside the western side of the building are oil tanks holding food grade oils, bulk storage containers, production tanks, a truck scale, and load out bins which are used to fill bulk pneumatic trailers with corn. Most of the southern face of the building is a truck docking area where the trucks are loaded. Inside of the building there are several rooms or areas where product is processed, packaged, or stored. The different rooms and areas are identified as "production corn," "mixing ingredients, finished goods," "production corn packing/palletizing," "production packing," "mix production," "mixing and warehousing," "lab," "maintenance," and "truck docking." The remainder of the building is comprised of four large warehouse sections. There is also an operations office, lunchroom, and restrooms.

Most of the raw materials from which the Employer makes its food and beverage products arrive via train. Railroad cars are stationed at unloading pits on either of the two tracks at the rear of the facility. It is there that production employees unload bulk amounts of corn, flour, meal grains, and food grade oils. The production employees hook up hoses to the railcars and pump the product into

storage tanks, production tanks, or packers. While this unloading is typically done by production employees, it appears that two or three times a month one truck driver will be asked to unload product from the railcars using a bulk pneumatic trailer.

Production employees take raw materials into one of several rooms or areas to be packed or processed. For example, production employees take corn from the railcars or storage bins into the "production corn" room, where they place it into machines to remove rocks, dust, or debris. The production corn operator runs the processing machines in that room.

Once cleaned, the loose corn is then transported by conveyor belt to either the packing station located outside of the building or into the next room, the "production corn packing/palletizing" room. Production employees manually bag the corn there, and run the bags through a sewing machine. Conveyor belts then take the bags to an automatic palletizer which loads set quantities of bags (24 or 50 100-lb bags) onto a pallet. A conveyor belt transports the loaded pallets to the shrink wrap machine located in the warehouse, where the pallet's contents are wrapped. Pallets can also be "handstacked"—a process whereby employees manually stack bags onto a pallet—by production, warehouse, and mix room employees. One or two drivers occasionally assist in the handstacking of pallets.

The processing that takes place in the "production packing" room is highly automated. Conveyor belts carry flour, corn flour, corn meal, corn grits, soy flour, and farina from the storage area, production tanks, or railcars into the production packing room. Packing machines in that room pack the product into bags. The packed bags are then run through a sealing system that seals the bags. After that, they are automatically taken to an ink jet system that puts lot numbers and identification on them. Another conveyor belt transports the bags into an accumulation conveyor and then to the palletizer.

In the "mixing and warehousing" area, mix and warehouse employees use forklifts and electric pallet jacks to assemble raw materials to be used in mixes. Following a batch sheet, or formula for a particular mix, mix and warehouse employees unload product and place them on different pallets according to what ingredients will go into the particular mix.

Mix and warehouse employees use forklifts to take those pallets of ingredients to the "mix production" room. Mix room employees load the mixed ingredients into large blenders to make cake, donut, cookie, drink, and ice cream mixes. The finished mixes are taken by conveyor belt to one of three different packing machines, where they are packed into various sized bags. The bags are loaded onto pallets. Warehouse employees pick up those pallets of product, take them to be stretch wrapped, and then either place them in storage or prepare them for shipment.

Quality assurance and mix employees take a sample of every batch of product to the lab, where quality assurance employees test it for "lot integrity." The sample can be tested in several different ways. For example, if the sample is from a cake mix, the quality assurance employees will bake a cake; if its from an ice cream mix, they will make ice cream. If it is a sample from a pre-mix to be used by a customer, the quality assurance employees will test the mix for the proper Ph levels or will conduct a smell test. Only after it is tested can the mix be moved onto the next step in the process. Three quality assurance employees work in the lab, and two others work throughout the plant to ensure the facility is operating in line the governmental regulations.

Once product is taken from any of the production rooms and stretch wrapped on a pallet, warehouse employees pick up the pallets with either forklifts or electric pallet jacks, and take them to storage in any of the four warehouse sections or take them to the staging area from where they will loaded onto trucks.

When a customer makes an order, warehouse employees gather full or partial pallets of product of the ordered items from the warehouse. The warehouse employees then take the pallets to the "truck docking" area for loading onto the delivery trucks.

The maintenance employees work throughout the different areas of the facility performing maintenance and repairs on production equipment inside of the building. They do the same for equipment outside of the building, such as the food-grade oil tanks and the bulk storage rooms. They repair equipment in the warehouse area, such electric pallet jacks, forklifts, and roll up doors. They make minor repairs on the trailers and very minor repairs on the trucks. The trucks are leased, and so the majority of truck repairs are done by the leasing company. Maintenance employees are not required to have any specialized training or certifications.

The Drivers. The drivers' main role is to deliver product to the customers; approximately ten-percent of the time, the drivers will deliver items from customers to the Employer. In carrying out their duties, the drivers operate any of three different types of trucks: tractor-trailers, bulk pneumatic trailers, and tankers.

After arriving at the facility, the drivers first pick up their bills of lading, or shipping documents, which describe what must be delivered and where. The drivers' routes change every day. The trucks are typically loaded when the drivers arrive in the morning; the warehouse employees load the trucks the night before the deliveries. The drivers will compare their shipping documents to the contents in the trailers. If an electric pallet jack is not already loaded onto the trailer, the drivers go and get one, as most customers require the drivers to unload the deliveries.

Before leaving the facility, the drivers conduct a 30 minute pre-trip inspection. This inspection is required by the United States Department of Transportation. Once the inspection is complete, the drivers head off to make their various

deliveries and pick-ups throughout the day. The drivers make deliveries throughout San Diego, Los Angeles, Orange, Ventura, and San Bernardino Counties. Drivers are rarely required to make deliveries out of state.

DISCUSSION

Legal Framework. The Board recognizes that there often is more than one way in which employees of a given employer may appropriately be grouped for the purpose of collective bargaining. The Board does not require a petitioner to seek any particular appropriate unit. Rather, the Board only considers whether the unit requested is *an* appropriate unit, even if it may not be the optimum or most appropriate unit for collective bargaining. *Overnite Transportation*, 322 NLRB 723 (1996). In determining an appropriate unit in a representation case, the Board first considers the Union's petition and whether that unit is appropriate. It is only when the petitioned-for unit is not appropriate that the Board considers the alternative units proposed by the Employer. *P.J. Dick*, 290 NLRB 150, 151 (1988). Thus, it is not my role to determine whether the unit requested by the Petitioner or the broader unit proposed by the Employer would be the most appropriate unit. Rather, I must determine whether or not the unit requested by the Petitioner is *an* appropriate unit.

In determining whether a unit requested by a petitioner is an appropriate unit, the Board focuses on whether the employees in that unit share a distinct community of interest. The Board considers the following factors in evaluating their community of interest: wages and method of compensation; hours of work; employment benefits; supervision; qualifications, training and skills; and job functions. The Board also considers the amount of working time spent away from the facility; the amount of contact with other employees; the integration of work functions with those of other employees; the amount of interchange with other employees; and the history of bargaining. *Overnite Transportation*, *supra* 322 NLRB at 724.

Analysis of Community of Interest Factors. As stated above, the Petitioner seeks a unit comprised of drivers, who constitute all of the employees in the transportation department. The Employer, however, seeks a wall-to-wall unit comprised of transportation, warehouse, production, mix room, quality assurance, and maintenance employees. The Employer thus holds the burden of demonstrating that the petitioned-for unit of just drivers is inappropriate. *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 701 (1967). To do this, the Employer must establish that the warehouse, production, mix room, quality assurance, and maintenance employees (whom I shall refer to as the "other employees") share such a strong community of interest with the drivers as to render a unit of just drivers inappropriate for collective bargaining.

The record contains several facts pointing to a limited community of interest between the drivers and the other employees. All employees share a common lunchroom, locker area, time clock, restrooms, and parking area. All employees are paid hourly and receive the same vacation benefits, holidays, retirement plan, and medical insurance. They are also subject to the same leave policies and overtime rules.

Forty percent of the 33 drivers transferred to the transportation department from other departments, such as warehouse, production, and mix room. Three drivers who, for various health reasons, were unable to continue driving were transferred to the warehouse department. Over the past three or four years, the Employer has assisted eight or nine non-driver employees in obtaining their Class A licenses by supplying them with equipment and training.

At the customer's site, the drivers usually have the responsibility of unloading the delivery. If the customer has ordered a pallet or pallets of product, then the driver uses an electric hand jack to unload those pallets. The driver may also be required to handstack the product—that is, manually carry bags of product and place them at assigned spots in the customer's facility. Operation of an electric pallet jack and

handstacking are two job duties also performed by production, warehouse, and mix employees at the facility.

On a small minority of deliveries, drivers are accompanied by helpers, who are employees from the warehouse department. Helpers go to assist drivers on large deliveries which involve handstacking. While the Employer does not keep records documenting the percentage of trucks that are sent out with a helper aboard, the testimonial evidence established that it was a small minority of the time. The role of the helpers is to unload the product at the customer sites; they do not drive the trucks.

Twice a year, the drivers attend a safety meeting. The safety meetings are conducted by a leadperson from the warehouse department.

While the foregoing shows that some limited community of interest factors exist, those factors are far outweighed by the factors showing that the drivers enjoy a community of interest distinct from that of the other employees.

Drivers are required to hold qualifications that are different from those of the other employees. Drivers must have class A licenses, which allow them to drive the Employer's tractor-trailers, tankers, and pneumatic trucks. The helpers who sometimes accompany the drivers are not required to have Class A licenses, as they never drive the trucks. Two warehouse employees have Class A licenses and are sometimes asked to fill in for a driver for a shift. However, this happened fewer than 15 times in the past year, and was therefore not a normal occurrence. None of the other employees are required to have Class A licenses.

Some of the other employees are required to hold certifications that are not required of drivers. For example, all employees in the warehouse and mix departments are required by Cal-OSHA to be certified forklift operators. None of the drivers are required to be certified as forklift drivers. On the other hand,

maintenance and quality assurance employees are not required to have any special certifications at all.

Drivers must pass medical inspections every two years. This is required of truck drivers by the Department of Labor. None of the other employees are required to undergo medical examinations.

Each department has a separate supervisor. The drivers report to the transportation manager. The transportation manager interviews applicants for driver positions and makes his recommendation to the division manager. He also makes recommendations concerning discipline of drivers. The transportation manager assigns the drivers' assignments, which change daily. If drivers need to leave work early, they obtain permission from the transportation manager. If drivers wish to take vacation, they speak to the transportation manager. If drivers have a problem or complaint, they speak to the transportation manager. The other department managers similarly oversee their departmental operations.

The start times for the drivers can vary from day to day. Some of the drivers are required to telephone the Employer in the evening to find out what time they are to report to work the next day. The varying start times are imposed by the Employer and are dictated by a customer's distance from the facility as well as when the customer would be able to receive a particular delivery. The start times for the morning drivers range from 4:00 to 6:00 a.m., and the start times for the afternoon drivers range from 11:00 a.m. to noon. Each driver's route changes everyday. The other employees have set start times (except the three quality assurance employees in the lab, whose starts times apparently can change depending on their project).

The drivers perform a unique job function; they operate trucks to make deliveries to customer sites, unload product at customer sites, and occasionally to pick up product from the customer for delivery to the Employer. The job functions of the employees in other departments are materially different. The principal duty of

production employees is to unload, clean, process, and pack the raw materials that are brought to the Employer's facility. The principal duty of mix employees is to combine various ingredients in the large blenders to create the Employer's many food and drink mixes. The principal duty of the warehouse employees is to move product around the facility and to load the trailers and tankers driven by the drivers. The principal duty of quality control employees is to test the mixes blended by the mix employees and to ensure that the Employer's operations are in line with governmental regulations. The principal duty of the maintenance employees is to maintain equipment at the facility and to do some minor repairs on equipment as well as vehicles.

Drivers spend the bulk of their days on the road. Even during slow periods, the drivers are on the road at least eight hours per day. Driver logs shows that drivers spend the majority of their time away from the facility, and the other employees, driving and making deliveries. With the exception of helpers who sometimes accompany drivers for the purpose of unloading large orders that require handstacking, all of the other employees work at the facility.

Drivers are required by the Department of Labor to keep detailed logs. The logs document every 15 minutes of the drivers' entire day, including when they are off duty, when they are driving, and when they are doing other work. The Employer also requires drivers to keep detailed logs showing when they leave the facility, when they arrive and how long they stay at the customer's site, the location of their next delivery, etc. The drivers are required to turn in their reports each day to the transportation department manager. While other departments keep logs, the record is silent as to how detailed the logs are. None of the other logs appear to be required by a governmental body.

The drivers have different shifts and work different hours than the other employees. Drivers work mostly during the daytime, in two shifts. The morning shift begins sometime between 4:00 and 6:00 a.m. (the shift times change each

day); the afternoon shift begins between 11:00 a.m. and noon. In contrast, the production, warehouse, and mix employees work 20 to 24 hours per day, in three separate shifts. The warehouse employees work around the clock in three shifts: first shift from 4:00 a.m. to 1:30 p.m.; second shift from 1:30 p.m. to 9:30 p.m.; and third shift from 8:30 p.m. to 5:00 a.m. The production employees work 20 hours per day in three shifts: first shift from midnight to 4:00 a.m.; second shift from 4:00 a.m. to noon; and third shift from 2:30 p.m. to 8:00 p.m. The mix room employees work 24 hours per day in three shifts: first shift from 12:30 a.m. to 9:00 a.m.; second shift from 8:30 a.m. to 5:00 p.m.; and third shift from 4:30 p.m. to 1:00 a.m. On the other hand, the maintenance employees work just one shift from 8:00 a.m. to 4:30 p.m. The quality assurance employees appear to work just one shift as well, although the employees in the lab may have staggered start times.

The drivers appear to have limited contact with the other employees. Drivers and production employees rarely interact. Drivers and maintenance employees appear to have minimal contact, as drivers need not be present when the maintenance employees repair the trucks. Drivers and warehouse employees have limited contact. The trucks are generally preloaded by the warehouse employees before the drivers arrive. If drivers return to the facility mid-shift to pick up a second trailer of deliveries, and the second trailer is not yet fully loaded, the drivers are not required to aid the warehouse employees in loading it. Instead, the drivers can use this time to take their breaks, eat lunch, catch up on their paperwork and log entries, or wait beside the trailer and watch as it is being loaded. The record did not indicate any regular contact between the drivers and the quality assurance employees.

The starting wage for drivers, at \$10.00 per hour, is higher than that of the other employees. The starting wages for the other departments are: \$7.00 to \$8.50 for warehouse, \$7.00 for production, \$7.00 for mix, \$7.00 for quality assurance, and \$8.50 to \$9.00 for maintenance.

Whether employees receive wage increases depends on their safety record while on duty. For example, both truck drivers and forklift operators may be penalized in regard to their next raise if they have an accident on the job. But drivers are also evaluated on their driving records when off duty, while the other employees are not. For example, if drivers are ticketed for drunk driving while off duty, they may be denied raises on that basis, while the same is not so for the other employees.

All employees wear uniforms with a Honeyville Grain logo on the front, but the drivers wear uniforms that are different from that of the other employees. The drivers' uniform consists of a tan shirt and brown pants. The quality assurance, mix, and production employees wear white shirts and tan pants. Maintenance employees wear blue shirts and dark blue pants.

The drivers are equipped with pagers, while the other employees are not.

After evaluating the community of interest factors and the relevant case law, I conclude that the community of interest or degree of integration between the drivers and the other employees is not so great as to render the requested driver unit inappropriate.

With respect to the drivers, I particularly note that they have different training and certification requirements, are separately supervised, spend the bulk of their days away from the facility, have different shifts and variable start times, have different colored uniforms, are required by California statute to obtain medical evaluations, are required by the Department of Transportation to keep detailed logs documenting their work and off-duty hours, and are the only employees who can be denied raises for off-duty traffic violations. Moreover, contrary to the assertion by the Employer, I conclude that the record does not establish substantial regular interchange between the drivers and the other employees.

In regard to the Employer's contention that the drivers sometimes perform duties which overlap with the duties of the other employees—such as unloading products from rail cars, handstacking, sweeping, and working production—I note that the Board has found appropriate separate driver units to be appropriate even where the drivers occasionally performed the work of other employees. For example, in *Ballentine Packing Co.*, 132 NLRB 923 (1961), the Board found a separate unit of drivers and a separate unit of production and maintenance employees appropriate although the drivers worked at times inside the plant when there was no driving to do. In this regard, the Board noted that the drivers regularly spent a majority of their time performing truck driving duties and comprised a functionally distinct group of employees whose interests and conditions of employment differed from those of the production and maintenance employees. *Id.* at 924. See also *Reichhold Chemicals, Inc.*, 126 NLRB 619 (1960), in which the Board found that the truckdrivers constituted a functionally distinct group and a separate appropriate unit, notwithstanding the fact that the drivers, who were paid on a mileage basis, occasionally accepted hourly-paid work in the plant usually performed by production and maintenance employees in order to avoid brief layoffs when work was slow.

More recently, in *Home Depot USA*, 331 NLRB No. 168 (August 25, 2000), the Board reversed an Acting Regional Director who had dismissed a petition for a unit of drivers and dispatchers because she had concluded that they did not share a sufficient community of interest to constitute an appropriate unit. The Board acknowledged that all employees, including drivers, were paid on an hourly basis, punched a time clock, were eligible to participate in company-wide benefit programs, attended the same 5-day new employee orientation session, were subject to the same work rules, attended the same meetings and social events and used the same parking, restroom and break facilities. Furthermore, the drivers were not separately supervised. The Board also noted that the drivers and other employees had a degree of overlapping job function and employee interchange. In

fact, the drivers spent up to 30 to 40 percent of their time pulling merchandise for delivery, a function usually performed by “pullers.” Also, on occasion, hourly employees accompanied drivers to assist in deliveries and drivers may have been assigned to work inside the store instead of driving if driving conditions were hazardous, if the driver was waiting for a certification, or if the volume of deliveries was low. Nevertheless, the Board concluded that these similarities were substantially outweighed by the factors supporting a conclusion that the drivers shared a distinct community of interest. In this regard, the Board particularly noted that the drivers had special driving qualifications and licensing, spent the majority of their time on the road making deliveries, wore distinct uniforms, and had contact with other employees that was only incidental to their primary job function of preparing for and making deliveries. The Board found that the possibility that drivers might be assigned to work in the store in certain circumstances and the fact that other employees might accompany drivers on deliveries did not establish a substantial interchange among drivers and other employees.

The Employer asserts that, when drivers are at the facility with no delivery work occupying them, they are to help out by doing non-driving tasks. This includes sweeping the truck dock and the area of the warehouse immediately inside of the truck dock, sweeping out trailers, and helping to load trailers or containers. The record revealed, however, that the time spent by drivers doing work unrelated to driving was minimal. For example, in the month of October 2001, the Employer was able to identify only ten instances (three of them by one employee) where drivers engaged in non-driving duties. Given that there were 33 drivers working 5 shifts per week for an average period of 2 hours per instance, this number was minimal. The Employer presented documents showing instances where drivers did such work but no evidence placing those instances in context. Whether those instances of non-driving activity amounted to anything but sporadic occurrences is unknown. To the contrary, testimony from both Employer and Petitioner

witnesses showed that the drivers rarely engaged in such activity unrelated to their driving duties.

The Employer points out that drivers regularly do some tasks that are also done by the other employees, such as operate electric pallet jacks and handstack. The mere occurrence of a few similar job duties does not, however, establish a close community of interest. For example, in *Overnite Transportation Co.*, 322 NLRB 347 (1996), the drivers performed job duties that were performed by all employees. Nonetheless, the Board reversed the decision of the Regional Director and found a separate unit of drivers to be appropriate.

The Employer finds significance in the fact that two warehouse employees have Class A licenses and are periodically asked to drive trucks on deliveries when drivers were unavailable. These occurrences are, however, rare—amounting to fewer than 15 deliveries in the past year. The Board has long considered such overlap, done on an irregular and infrequent basis, insufficient to find a petitioned-for unit of drivers inappropriate. For example, in *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 700-701 (1967), the Board reversed the decision of the Regional Director and found that the drivers constituted a functionally distinct and appropriate unit separate from the mechanics even though one of the mechanics occasionally drove a truck to haul milk.

As to the terms and conditions of employment shared by the drivers and the other employees—common vacation benefits, medical benefits, retirement benefits, holidays, hourly payment, lunchroom, locker area, time clock, restrooms, and parking area—the Board has held such factors not so significant as to require the inclusion of all of the employees in a single unit. *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 701 (1967)

The Employer cited only one decision in its brief. That decision, *Precision Bulk Transport*, 279 NLRB 437 (1986), was an unfair labor practice case, not

a representation case, cited for the proposition that extensive governmental regulation was not a factor in distinguishing between independent contractors and employees. The Employer cited no decisions in which the Board found a requested unit of drivers inappropriate where, as is the immediate circumstance, the drivers did not share a strong community of interest with the other employees.

Based on the foregoing analysis, I find that the drivers constitute an appropriate unit. There are approximately 33 employees in the unit found appropriate.

- 3/ The petition states that the employees to be excluded are: "All office clerical employees, professional employees, guards, and supervisors as defined in the Act." The Employer correctly points out in its brief that this list of excluded employees is incomplete, in that it fails to expressly exclude the production, warehouse, mix, quality assurance, and maintenance employees. However, Petitioner made unequivocally clear at the hearing that it seeks to exclude these employee positions as well. Petitioner also expressly requests the exclusion of these employees in its brief.
- 4/ In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

440 1760 1580
440 1760 6240
440-1760-6780